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No. 214

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMERICAN STEVEDORES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Eastern District of New York (Pet. App. 10–15) are reported at 1959 A.M.C. 1808. The opinion of the Court of Appeals for the Second Circuit (Pet. App. 16–20) is reported at 277 F. 2d 255.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1960 (Pet. App. 21). The petition for a writ of certiorari was filed on July 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner is liable under its stevedoring contract to indemnify the United States for losses sustained as a result of an injury to one of petitioner's employees.

STATEMENT

Petitioner, a stevedoring contractor, contracted with the United States for the unloading of the *Henry Gibbons*, a vessel owned and operated by the United States (Pet. App. 17, 22). Under the contract, petitioner agreed that it would indemnify the United States "for any and all loss, damage, liability and expense for * * * bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the contractor [*i.e.*, petitioner], his officers, agents, or employees in the performance of work * * *." The contract contained two "specific limitations" to petitioner's "general liability and responsibility" to indemnify the United States. First, petitioner was not to be liable if "the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such * * * injury or death, and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment or through the exercise of due diligence could not otherwise have avoided such * * * injury, or death." Second, petitioner was not to be liable "if the * * * injury or death resulted solely from an act or omission

of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer" (Pet. App. 22–23).

Santomarco, a longshoreman employed by the petitioner, was injured while participating in the unloading of the *Henry Gibbons*. He sued the United States, who impleaded petitioner under its contract of indemnity. After a trial, the district court found that the accident occurred when Santomarco slipped and fell in some oil which had run across the deck of the vessel during the unloading operation (Pet. App. 10–11). This oil had been in a well-traveled and conspicuous part of the deck for at least one and one-half hours before the accident (Pet. App. 12) and was known to Santomarco and other employees of petitioner for a time sufficient to enable them to take steps to prevent the accident (Pet. App. 12). Petitioner's employees did not report the oil to petitioner's hatch boss, who, in turn, the court found, could have reported the matter to one of the vessel's officers and suspended work in the vicinity of the oil until it was removed (Pet. App. 11).

The court found that the accident was caused by the unseaworthiness of the vessel combined with the negligence of Santomarco, the United States, and petitioner. On the basis of these findings, the court determined that the United States was liable to Santomarco for one-half of his damage. The court further held that, because the accident was, under the terms of the indemnity contract, "occasioned in part" by petitioner's negligence, the Government

was entitled to indemnity from petitioner for the amount of its liability to Santomarco. Since petitioner was aware of the presence of the oil on the deck, the court concluded that neither of the limitations upon the indemnity clause was applicable.

Petitioner appealed from the determination that it was liable under the indemnity clause. The Court of Appeals for the Second Circuit affirmed, holding (Pet. App. 18–19):

> In this case it was the "unseaworthiness" of the ship that "contributed jointly with" a "fault or negligence of the contractor," because the spot of oil was evident to employees of "Stevedores" [*i.e.*, petitioner] other than the libellant, who were at work thereabouts, and who did not call the attention of any of the ship's company to it, or ask to have it wiped up or sprinkled with sawdust. Moreover, if that would not have "avoided" the injury—which there is every reason to suppose that it would—by the "exercise of due diligence" they could have wiped up the oil themselves. Hence "Stevedores" is liable for any recovery.

ARGUMENT

The decision of the court of appeals was clearly correct and is not in conflict with the decision of any other court. Further review is not warranted.

1. Petitioner contends that the United States was not entitled to indemnity because the Government was responsible for the maintenance of the winch from which the oil had originally leaked onto the deck.

As both courts implicitly recognized, however, the source of the oil is totally immaterial. What is of importance is the fact that, regardless of where it came from,[1] the oil was on the deck for a period sufficient to enable petitioner's employees, who actually knew it was there, to cover it, clean it up, or report it to the ship's officials. Clearly, their failure to do so was, in the words of petitioner's agreement to indemnify (see *supra*, p. 2), "negligence * * * in the performance of work under [the] contract" which caused "in whole or in part" the injury to Santomarco. Further, the clauses limiting the agreement to indemnity clearly do not apply since the oil on the deck was neither a defect which the employees of petitioner "could not have discovered * * * by the exercise of due diligence," nor a condition which "resulted solely from an act or omission of the Government."[2]

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[1] The district court expressly stated that the evidence was insufficient to enable it to make a finding as to what caused the oil to be on the deck (Pet. App. 12). The court of appeals stated that it came from a winch which had leaked or overflowed (Pet. App. 17).

[2] Even if, as petitioner claims, the United States were responsible for the winch, this does not support petitioner's contention that (Pet. 8–9), if applicable, the indemnity clause is void. Irrespective of who had control of the winch, the fact remains that the injury was found to have been partially occasioned by the negligence of petitioner. As applied here, the indemnity clause is fully consistent with general principles of maritime law, since it makes the stevedore liable in indemnity for failure to exercise reasonable care in performing its duties. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124; see also *United States* v. *Harrison*, 245 F. 2d 911, 914 (C.A.

2. Petitioner also contends (Pet. 6–7) that the decision of the court of appeals is in conflict with *United States* v. *Harrison*, 245 F. 2d 911 (C.A. 9). There, the United States as shipowner was likewise adjudged to be liable to a longshoreman who had slipped and been injured on an oily deck, and attempted to obtain indemnity from the longshoreman's employer under contract provisions identical to those involved here. The Ninth Circuit upheld the district court's ruling that the stevedoring contractor was not liable under the contract because the injury did not result from any negligence of the contractor.

In finding that the contractor was not negligent, both courts in *Harrison* expressly relied on the fact, not mentioned by the petitioner here, that, before the accident, the stevedoring contractor had called the oily condition of the deck to the attention of the ship's officers, and had proceeded to work on the deck only at the insistence of the ship's officers. By contrast, in this case the courts below found that petitioner was negligent by reason of the *failure* of its employees to report the oily condition of the deck to the ship's officers, or to do anything else to remedy the dangerous condition created by the oil. This finding of negligence, which was fully supported by the evidence, makes petitioner clearly liable under the terms of its contract.

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9), which cites with approval *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (C.A. 9), certiorari denied, 338 U.S. 904.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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